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In the
Supreme Court of the United States

OCTOBER TERM, 1959

ROY E. RICHISON and VERA RICHISON, his wife, *Petitioners*,
vs.
DR. LESLIE L. NUNN and ELIZABETH NUNN, his wife, *Respondents*.

No. 119

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS IN OPPOSITION

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ROY E. RICHISON and VERA RICHISON, his wife, *Petitioners*,

vs.

DR. LESLIE L. NUNN and ELIZABETH NUNN, his wife, *Respondents*.

No. 977

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS IN OPPOSITION

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DR. LESLIE L. NUNN and ELIZABETH NUNN, his wife, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS IN OPPOSITION

Petitioners are seeking a review of the judgment of the Supreme Court of the State of Washington in the case of Richison vs. Nunn, case number 34496 of the Washington State Supreme Court, which judgment appears in 154 Washington Decisions 365.

Respondents herewith present their brief in opposition to aforesaid petition.

CLAIMS OF PETITIONERS

The petition attempts to set up five main points:

1. A denial of due process of law (Fourteenth Amendment);

2. A denial of equal protection of the laws;

3. Denial of the right of trial by jury;

4. Deprivation of Petitioners of their property without due process of law; and

5. Abridgment of their privileges and immunities as citizens of the United States, in violation of the Fourteenth Amendment to the Federal Constitution.

RESPONDENTS' POSITION

It is the position of the Respondents that the writ of certiorari should not be granted for the following reasons:

1. The petition presents no federal question, and,

2. The Petitioners have not been denied their constitutional rights.

BASIC FACTS

The basic facts are as follows: The Petitioners herein filed an action for malpractice against the Respondents, Dr. Leslie L. Nunn and Elizabeth Nunn, in the Superior Court of Clark County, Washington. All parties were residents of Washington. In due time the cause was tried and a verdict was rendered against the Respondents. Judgment was duly entered, and within the required time notice of appeal to the Supreme Court of Washington was given. Briefs were filed and the appeal was argued. The Supreme Court of Washington reversed the trial court. There were six justices for reversal and three for affirmance.

The Washington State Supreme Court held that the plaintiffs (Petitioners herein), had failed to sustain the

burden of proving that Mrs. Richison's disability was the result of the defendants' negligence, and the judgment was reversed.

The Petitioners filed a petition for rehearing which, in due course, was denied.

At a later date the Petitioners herein filed their petition for writ of certiorari in the United States Supreme Court, seeking to get a review of the aforementioned Washington case.

The Court will see that this matter is a usual tort case, tried in the state courts with ordinary local litigants, and of no special importance to the public. No public question is involved.

UNDER WHAT CONDITIONS WILL CERTIORARI BE GRANTED?

Rule 19 of the United States Supreme Court is as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, which neither controlling nor fully measuring the Court's discretion, indicate the character of reason which will be considered: (a) Where a state court has decided a Federal question of substance not theretofore determined by this Court or has decided it in a way probably not in accord with the applicable decisions of this Court."

THERE MUST BE A FEDERAL QUESTION (It must be substantial)

To give a Federal court jurisdiction of a cause on ground that a Federal question is involved, there must be a Federal

question, not in form but in substance. *Hudson Motor Car Co. vs Detroit*, 136 Fed. 2d 574, 576; *Brasuall vs McGowan*, 32 Fed. Supp. 678; *Cuyahoga River Power Co. vs Northern Traction Co.*, 252 U.S. 388.

In *Rice vs Sioux City Memorial Cemetery*, 349 U.S. 70, 80, this Court held certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority. Review by certiorari is in the interest of the law, its appropriate expedition and enforcement, not in the mere interest of the litigants. Upon rehearing certiorari was dismissed as improvidently granted. See also *Monrosa vs Carbon Black Co.*, 359 U.S. 180.

"We do not grant certiorari to review evidence and discuss specific facts". Mr. Justice Holmes in the case of *United States vs Johnston*, 268 U.S. 220, 227.

In the case of *Dick vs New York Life Insurance Co.*, 359 U.S. 437, 450, Mr. Justice Frankfurter quoted with approval Mr. Justice Stone in an earlier case, *Washington Fidelity National Insurance Co. vs Burton*, 287 U.S. 97, as follows:

> "It thus appears that the construction of the statute which we were asked to review is not in the case, and even if it were, it is of local significance only. The conflict of decisions asserted is not shown. Plainly the question is not of such general interest or importance as, under the rules and practice of this Court, warrants its review upon certiorari. For these reasons it is the duty of this Court to dismiss the writ as improvidently granted."

Cases which raised as their sole question the sufficiency of the evidence for submission to a jury were not regarded as complying with the standards necessitated by the purpose of the rule for limiting the power of review by certiorari. *Dick vs New York Life Insurance Co.* (1958), 359 U.S. 450-451.

DENIAL OF DUE PROCESS OF LAW

The Seventh Amendment to the United States Constitution, "Trial By Jury in Civil Cases", states: "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The Seventh Amendment to the United States Constitution does not limit the states, but does limit the United States. See *Wagner Co. vs Lyndon*, 262 U.S. 226.

The deprivation of a right of trial by jury in a state court does not deny the parties due process of law under the Federal Constitution. *Wagner Co. vs Lyndon*, 262 U.S. 226; *Walker vs Sauveist*, 92 U.S. 90; *Missouri vs Lewis*, 101 U.S. 22, 31; *Twining vs New Jersey*, 211 U.S. 78, 110-111; *Minneapolis & St. Louis Railway Co. vs Bomboli*, 241 U.S. 211, 217.

The machinery for review of judgment of a court of first instance is wholly within the control of the state legislature. *Missouri vs Lewis*, 101 U.S. 22, 30.

The Fourteenth Amendment to the United States Constitution says: ". . . nor shall any state deprive any person

of life, liberty or property without due process of law."

In application of the Fourteenth Amendment, the duty of the Supreme Court does not go beyond safeguarding rights essential to a fair hearing by the state. *Foster vs Illinois*, 332 U.S. 134.

Protection of the Fourteenth Amendment can be invoked only if a state deprives any person or denies enforcement of a right guaranteed. *Rice vs Sioux City Memorial Cemetery*, 349 U.S. 70.

In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in a spirit of science, or a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not in ad hoc and episodic, but duly mindful and reconciling the needs both of continuity and of change in a progressive society. *Rochin vs California*, 342 U.S. 165; *Wolf vs Colorado*, 338 U.S. 25.

EQUAL PROTECTION OF THE LAWS

The Fourteenth Amendment to the United States Constitution states as follows: ". . . nor deny to any person within its jurisdiction the equal protection of the laws."

So long as a law applies to all alike, the requirements of "equal protection of the law" are met. See *Francis vs Resweber*, 329 U.S. 459; rehearing denied 330 U.S. 853.

Protection of the Fourteenth Amendment can be invoked only if the state deprives any person or denies enforcement of a right guaranteed. *Rice vs Sioux City Memorial Cemetery*, 349 U.S. 70.

The concept of "equal protection of the law" and "due

process" both stem from the American ideal of fairness, and are not mutually exclusive, nor are the concepts always interchangeable, in that equal protection of the laws is a more explicit safeguard of prohibited unfairness than it is due process of law. *Bolling vs Sharp*, 347 U.S. 497; *Barrons vs Jackson*, 346 U.S. 249.

RIGHT OF TRIAL BY JURY

The guarantees of jury trial contained in the Federal Constitution, and in the Sixth Amendment thereto, are limitations solely on the powers of the Federal Government and trial by jury may be modified by a state, or even abolished altogether. See USCA, Constitution, Article III, Section 2; also the Sixth Amendment; also *City of Bellingham vs Hite*, 37 Wash. 2d 652, 225 P. 2d 895.

The function of the Supreme Court under the Fourteenth Amendment relating to juries is not to prescribe procedures, but it is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ. *Fay vs People*, 332 U.S. 261.

DEPRIVING ONE OF PROPERTY WITHOUT DUE PROCESS

Want of due process under the Federal Constitution is not established by showing that the decision complained of was erroneous. See *Shematis vs Reid*, 193 Fed. 2d 119.

The Federal Constitution does not guarantee uniformity of decisions by state courts. *Kenny vs Fox*, 132 Fed. Supp. 305.

"Due process of law" requires not only opportunity for presentation of evidence and cross-examination of witnesses,

but also opportunity for argument. *L. B. Wilson Co. vs Federal Communications Commission*, 170 Fed. 2d 793.

The Federal Constitution does not guarantee a citizen against loss through erroneous decisions of the state courts. *Kenny vs Fox*, 132 Fed. Supp. 305, affirmed 232 Fed. 2d 288.

The dismissal of an appeal from a money judgment by a state appellate court, as a reasonable measure for safeguarding the collectibility of that judgment, does not violate the due process clause or the equal protection clause of the Fourteenth Amendment; and upon the facts in the case the state appellate court's dismissal of Petitioner's appeal was a reasonable measure. *National Union vs Arnold*, 348 U.S. 37.

An erroneous judicial ruling does not necessarily amount to deprivation of due process of law, since an erroneous decision of law or fact does not deprive the unsuccessful party of property without due process of law. See *Arrowsmith vs Harmoning*, 118 U.S. 194.

Due process of law does not mean infallible process of law. *Commercial Insurance Co. vs Ramos*, 243 Fed. 2d 488; *Schechtman vs Foster*, 172 Fed. 2d 339.

Appellate review is not of the essence of due process. See *In Re Josephson*, 218 Fed. 2d 174, 181; *McKane vs Durston*, 153 U.S. 684.

Parties obtain no vested rights in the orders or judgments of courts while they are subject to review. *American Steel Foundry Co. vs Tri-City Central Trade Council*, 257 U.S. 184; *Boardwalk & Seashore Co. vs Murdock*, 286 New York 494.

The reversal of a judgment by any competent authority restores the parties litigant to the same condition in which they were prior to its rendition. The judgment reversed becomes a mere waste paper. See *II Freeman on Judgments*, (5th Edition), 2416, Section 1167.

There is authority that a judgment is not a vested right until the term at which the judgment was rendered ends, and that no vested right exists in a judgment while it is subject to review or while an appeal therefrom is pending. See *30A American Jurisprudence*, 162, Judgments, Section 6.

ABRIDGING PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES

The Fourteenth Amendment to the Constitution of the United States is as follows: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States."

"Privileges and immunities" means a favor granted; a special privilege; a privilege or favor not granted to others. See *16A, Corpus Juris Secundum*, 169, Constitutional Law, Section 458.

The Fourteenth Amendment does not forbid all discrimination or inequality, and certain privileges may be granted some and denied to others, under some circumstances, if they be granted or denied on the same terms and if there exists a reasonable basis therefor.

The "privileges and immunities" protected by this clause of the Constitution are only those which owe their existence to the Federal Government, its national character, its constitution, or its laws, and not such rights as accrue from state

citizenship. See 16A, C.J.S., 169, Constitutional Law, Section 458. See also *Maxwell vs Dow*, 176 U.S. 581. See also 33 Words and Phrases (Permanent Edition) 780-781.

The "privileges and immunities" of citizens of the United States protected by the Constitution, Amendment Fourteen, Section 1, providing that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, are those which arise out of the nature and essential character of the national government, the provisions of its constitution or its laws and treaties made in furtherance thereof. See 33 Words and Phrases (Permanent Edition) 780-781.

The guarantee contained in Article IV, Section 2, of the Federal Constitution, protects only citizens of a state in their natural capacity, and applies only to persons, not to things. It requires each state to accord to citizens of other states the "privileges and immunities" to which its own citizens are entitled, but does not operate as a limitation of a state's authority over its own citizens, or give those citizens of other states greater privileges in a particular state than those enjoyed by its own citizens. See 16A CJS, 166, Constitutional Law, Section 457.

The cases of *Davis vs Virginia Railway Co.*, 361 U.S. 354, decided January 25, 1960, and *Sentilles vs Inter-Carribean Corp.*, 361 U.S. 107, decided November 23, 1959, have been cited by Petitioners. Davis asked for certiorari to the supreme court of appeals of Virginia and Sentilles sought certiorari to the court of appeals of the Fifth Circuit.

Each case had a Federal question; Davis, construction of the Federal Employers Liability Act; Sentilles was a suit by

a seaman under the Jones Act, martime law, an Act of Congress. Certiorari was allowed in each case, although there were several Justices who felt that the writs should not issue or that the writs were improvidently granted.

In the Davis case there were two claims. One, for negligence upon the part of the employer, and, two, for malpractice on the part of a doctor for the employer. The Court reversed the state court on the first ground of negligence and affirmed the state court on the malpractice. It is evident that certiorari would never have been granted if the only question had been on the malpractice phase.

The majority opinion, at page 358, stated: "This offer of proof was fatally deficient. No foundation was laid as to the recognized medical standards for the treatment of such a fracture. No standard having been established, it follows that the offer of proof was not sufficient. The trial judge, therefore, was correct in declining to submit the malpractice claim to the jury."

In Sentilles, supra, an action under the Jones Act for negligence, plaintiff was a seaman and claimed to have been injured. There was a Federal question, a construction of a Federal act. The case hinged around medical testimony as to cause of injury. Several Justices felt the United States Supreme Court should not be hearing this type of case. Mr. Justice Stewart said: "The case should not be in the Supreme Court to review individualized personal injury cases in which the sole issue is sufficiency of the evidence."

Mr. Justice Harlan concurred with Mr. Justice Stewart. Mr. Justice Frankfurter said: "We do not grant certiorari to review evidence and direct specific facts."

Let us refer now to page 23 of the petition, wherein Petitioners contend that a judgment is property under the Fourteenth Amendment. In all cases therein cited, the period of appeal had expired and judgments became vested. In the instant case the appeal was perfected by the Respondents herein (Defendants-Appellants in the state court). There never was a vested right in the Petitioners in the judgment. The judgment below was not such a property right under the Fourteenth Amendment. A judgment reversed becomes merely a scrap of paper; the reversed judgment was never vested and did not become property.

THERE IS NO FEDERAL QUESTION INVOLVED IN THE INSTANT CASE

The numerous cases cited by counsel in Petitioners' brief have been examined and are not detrimental to the Respondents' views in the instant case on the basis of facts. The many cases cited by Petitioners allowing certiorari had a Federal question, such as involving a Federal statute; state statutes involving a Federal question; substantial constitutional questions involving the Federal constitution; matters of large public concern, all cases which the Supreme Court of the United States is required to supervise. In the instant case the parties are local and the issues involved are of interest only to the litigants. This case should not take up the time and the energy of the United States Supreme Court; it is of a local nature; there is no Federal question in the instant case.

The United States Supreme Court, in deciding the question of certiorari, must analyze the facts of the case. The mere fact that the Petitioners window dress the case up

with high-sounding constitutional expressions does not bind the Court. The Court must look through the maze of constitutional words and examine the basic facts. The case of *Dick vs New York Life Insurance Co.*, 359 U.S. 437, 450, and *Fidelity National Insurance Company vs Burton*, 287 U.S. 97, are good examples of petitions for writs of certiorari which contain expressions which went beyond the facts of the case. There is no principle in this case involving public rights or matters of public importance.

Assuming for the sake of argument that there is a Federal question, in the case of *Rice vs Sioux City Memorial Cemetery*, 349 U.S. 70, the Supreme Court said: "The Supreme Court will not review a state court decision, even though a Federal question is involved, if the decision rests on an adequate state ground, but the Court itself will determine whether the state ground relied on is adequate." The case at bar was certainly tried and heard on an adequate state basis.

PETITIONERS HAVE NOT BEEN DEPRIVED OF THEIR CONSTITUTIONAL RIGHTS

The Petitioners received a trial in accordance with the laws and procedures of the state of Washington. Every right was extended them. They were given the opportunity to present their case to the trial court and jury. The law of Washington required them, in a malpractice case, to establish their case in accordance with the principles of proof established by the Supreme Court of the State of Washington in the case of *Fritz vs Horsfall*, 24 Wn. (2d) 14 at 16, 17.

"(4) Before a physician or surgeon can be held liable

for malpractice, he must have done something in the treatment of his patient which the recognized standard of medical practice in his community forbids in such cases, or he must have neglected to do something required by those standards. 48 C.J. 112

"(5) In order to sustain a judgment against a physician or surgeon, the standard of medical practice in the community must be shown, and, further, that the doctor failed to follow the methods prescribed by that standard.

"(6) It is not required that physicians and surgeons guarantee results, nor that the result be what is desired. *Williams v. Wurdemann*, 71 Wash. 390, 128 Pac. 639; *Lorenz v. Booth*, 84 Wash. 550, 147 Pac. 31; *Dishman v. Northern Pac. Beneficial Ass'n*, 96 Wash. 182, 164 Pac. 943; *Howatt v. Cartwright*, 128 Wash. 343, 222 Pac. 496; *Barker v. Weeks*, 182 Wash. 384, 47 P. (2d) 1.

"(7) The testimony of other physicians that they would have followed a different course of treatment than that followed by defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. In such cases, the court must hold that there is nothing upon which the jury may pass, the reason being that the jury may not be allowed to accept one theory to the exclusion of the other. *Howatt v. Cartwright*, 128 Wash. 343, 222 Pac. 496; *Kemp v. McGillivray*, 129 Wash. 592, 225 Pac. 631; *Hollis v. Ahlquist*, 142 Wash. 33, 251 Pac. 871; *Peterson v. Hunt*, 197 Wash. 255, 84 P. (2d) 999.

"(8) Negligence on the part of the physician or surgeon by reason of his departure from the popular standard of practice must be established by medical testimony. *Wharton v. Warner*, 75 Wash. 470, 135

Pac. 235; *Dahl v. Wagner*, 87 Wash. 492, 151 Pac. 1079; *Dishman v. Northern Pac. Beneficial Ass'n*, 96 Wash. 182, 164 Pac. 943; *Howatt v. Cartwright*, 128 Wash. 343, 222 Pac. 496; *Brear v. Sweet*, 155 Wash. 474, 284 Pac. 803; *Jordan v. Skinner*, 187 Wash. 617, 60 P. (2d) 697; *Peterson v. Hunt*, 197 Wash. 255, 84 P. (2d) 999; *Hoover v. Goss*, 2 Wn. (2d) 237, 97 P. (2d) 689; *Peddicord v. Lieser*, 5 Wn. (2d) 190, 105 P. (2d) 5; *Crouch v. Wyckoff*, 6 Wn. (2d) 273, 107 P. (2d) 339."

The evidence necessary for Petitioners to prevail was not presented. The Washington supreme court, in effect, said that the Petitioners (plaintiffs) failed to put on sufficient evidence to allow the case to go to the jury. This is not a Federal question, nor is it a constitutional matter.

There was no denial of equal protection of the laws. The case of *Francis vs Resweber*, 329 U.S. 459, and 330 U.S. 853, is authority for the rule that, "So long as a law applies to all alike, the requirements of equal protection of the laws are met." Certainly nothing can be shown in the record that this rule was violated.

As to the right of trial by jury, the error was made by Petitioners (plaintiffs) in that they did not prove their case. The state supreme court took the case from the jury because plaintiffs did not make the necessary proof. This is done by the trial judge quite frequently on motions for directed verdict.

The Petitioners have not been deprived of their property without due process of law. It seems that the Petitioners have taken the view that the judgment appealed from was property under the Fourteenth Amendment. Respondents

submit that the United State Supreme Court, in *American Steel Foundry Co. vs. Tri-City Central Trade Council*, 257 U.S. 184, has ruled that parties obtain no vested rights in the orders or judgments of courts while they are subject to review. Appellate review is not of the essence of due process. See *McKane vs Durston*, 153 U.S. 684.

The reversal of a judgment by any competent authority restores the parties litigant to the same conditions in which they were prior to its rendition. The judgment reversed becomes mere waste paper. See II Freeman on Judgments (5th Edition) 2416, Section 1167.

The Petitioners' privileges and immunities as citizens of the United States have not been violated under the Fourteenth Amendment. The Fourteenth Amendment does not forbid all discrimination or inequality, and certain privileges may be granted some and denied to others, under some circumstances, if they be granted or denied on the same terms and if there exists a reasonable basis therefor. The privileges and immunities protected by this clause of the Constitution are only those which owe their existence to the Federal Government, its national character, its constitution, or its laws, and not such rights as accrue from state citizenship. See *Maxwell vs. Dow*, 176 U.S. 581..

Having answered the petition filed herein, it is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

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